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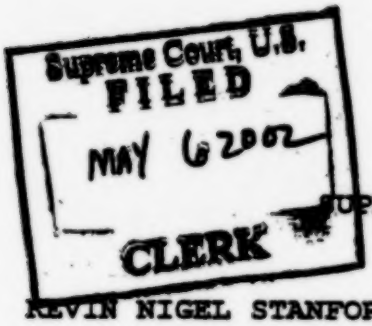


NO.

ORIGINAL

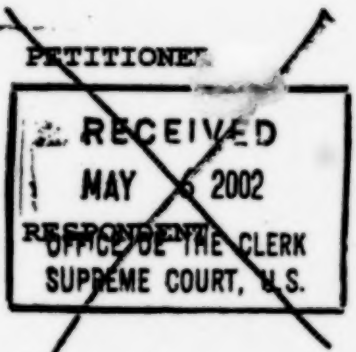
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

KEVIN NIGEL STANFORD

PETITIONER

vs.

MOTION FOR LEAVE TO
PROCEED *IN FORMA PAUPERIS*



PHIL PARKER, WARDEN

KENTUCKY STATE PENITENTIARY

RESPONDENT

* * * * * * * * * * * * *

The petitioner, Kevin Stanford, asks leave to file the attached Motion for an Extension of Time To File A Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without payment of costs and to proceed *in forma pauperis* pursuant to Rule 46.

Kevin Stanford is and has always been indigent. He has been incarcerated since 1981. Counsel Stefanie McArdle was appointed under the Criminal Justice Act. 18 U.S.C. §§3005 and 3006(A). Petitioner has been permitted by the Sixth Circuit Court of Appeals to proceed as an indigent at all stages.

Stanford, therefore, requests this Court's permission to proceed *in forma pauperis* in this cause of action.

10 57 pp

Respectfully submitted,

By: Margaret O'Donnell

Margaret O'Donnell, Esq.
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Stefanie McArdle (by mod)

Stefanie McArdle, Esq.
111 S Main Street
P.O. Box 7
Franklin, KY 42135

Counsel for petitioner

AFFIDAVIT IN SUPPORT OR REQUEST TO PROCEED *IN FORMA PAUPERIS*

Commonwealth of Kentucky)
) SS:
County of Lyon)

I, Kevin Stanford, being first duly sworn, depose and say that I am the Petitioner in this case. I believe I am entitled to redress. That in support of my motion to proceed *in forma pauperis* on my petition for writ of habeas corpus without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the further costs of these appellate proceedings or to give security therefore.

I further swear that the response which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this petition are true.

1. Are you presently employed? Yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $26.00, [redacted] Ky State Penitentiary, Inmate Work Assn.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any income from a business profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. ---.

---

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned. _____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

_____

6. I was represented at trial and on direct appeal by public defenders. A public defender represented me in state post-conviction proceedings. A public defender and CJA appointed attorney were appointed to represent me in federal habeas proceedings through the Sixth Circuit Court of Appeals. I am without funds to pay costs on my petition for writ of certiorari.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Kevin W. Stanford
Kevin Stanford
Petitioner

CERTIFICATE

I hereby certify that the Kevin Stanford has the sum of $105.00 on account to his credit at the Kentucky State Penitentiary where he is confined. .

_____
Authorized Officer of Institution

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF LYON)

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 25 day of January, 2002.

_____
Notary Public

Resident of Lyon County,
State of KY
My Commission Expires: 09-22-00

No._____

In the Supreme Court of the United States

OCTOBER TERM, 2001

Kevin Nigel Stanford
Petitioner,
v.

Phil Parker, Warden,
Kentucky State Penitentiary.
Respondent.

ORIGINAL PETITION FOR
WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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CAPITAL CASE

Question Presented

Does the imposition of the death penalty on a person who was seventeen years old at the time of the crime constitute cruel and unusual punishment which is also barred by treaties and customary international law in violation of the Eighth and Fourteenth Amendments as well as Article II, Section 2, Article III, Section 2 and Article VI, Section 2 of the United States Constitution?

Parties to the Proceedings in the Lower Courts

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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THE IMPOSITION OF THE DEATH PENALTY ON A PERSON WHO WAS 17 YEARS OLD AT THE TIME OF THE CRIME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS ALSO BARRED BY TREATIES AND CUSTOMARY INTERNATIONAL LAW IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE II, SECTION 2, ARTICLE III, SECTION 2 AND ARTICLE VI, SECTION 2 OF THE UNITED STATES CONSTITUTION. 12

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Kevin Nigel Stanford respectfully requests that the Court review this original petition for writ of habeas corpus and grant relief from his unconstitutional sentence of death. In support of his petition, Mr. Stanford sets forth the following:

Statement of the Basis for Jurisdiction

The Court has jurisdiction to entertain this original petition under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a). *See also Felker v. Turpin*, 518 U.S. 651, 658-662 (1996).

Required Statement Under 28 U.S.C. §2242

Kevin Stanford is not making application to the federal district court of the district in which he is held because no lower federal court would consider his claim in light of *Stanford v. Kentucky*, 492 U.S. 361 (1989). Petitioner asserts he is, by virtue of his age at the time of the offense and the law set forth in this petition, ineligible for a death sentence as a matter of law. Such a claim should not be subject to state procedural bars because to do so would result in a fundamental miscarriage of justice. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 348 (1992); *Smith v. Murray*, 477 U.S. 527, 537-38 (1986).

The restrictions on second or successive habeas corpus applications contained in 28 U.S.C. § 2244(b)(1) and (2), which "inform [this Court's] . . . consideration of original habeas petitions," *Felker v. Turpin*, 518 U.S. at 662-63, do not bar consideration of the claims raised herein. This petition, *inter alia*, seeks pronouncement of a new rule of international law and treaty law that is by its nature retroactive to all pending cases. *Cf.* § 2244(b)(2)(A); *Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989) (constitutional rules which "prohibit[] a certain category of punishment for a class of defendants because of their status or offense" apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989)).

Petitioner has not made this application initially in district court, *see* 28 U.S.C. § 2242 and Supreme Court Rule 20.4, because adequate relief cannot be had in that court in light of the strict

requirements of 28 U.S.C. §§ 2244(b) and 2253. Because this petition relies on international and treaty law which has not heretofore been interpreted by this Court, Petitioner cannot show he "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by 28 U.S.C. § 2244(b)(2)(A). Similarly, although Petitioner alleges factual and legal predicates for his claim not previously available that would preclude his death sentence, *see Sawyer v. Whitley*, 505 U.S. at 348, he cannot show that "but for *constitutional* error, no reasonable fact finder would have found [him] . . . *guilty of the underlying offense*" as required by 28 U.S.C. § 2244(b)(2)(A) (emphasis added). This case thus presents an exceptional circumstance which warrants the exercise of this Court's discretionary powers, for the relief sought can be obtained only from this Court where that power is "informed" but not necessarily limited by these statutory restrictions. *See Felker v. Turpin, supra.*

Constitutional Provisions and Treaties Involved

Constitutional Provisions. This case involves the Eighth and Fourteenth Amendments to the United States Constitution which provide in pertinent part:

> Amendment Eight states: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
>
> Amendment Fourteen, Section 1 states: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

This case also involves Article III, Section 2 of the Constitution of the United States, which provides in relevant part:

> The judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Counsels; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This case also involves Article II, Section 2 of the Constitution of the United States, which provides in pertinent part that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .."

This case also involves Article VI, Section 2 of the Constitution of the United States, which provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Treaty Provisions. This case also involves the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, arts. 4 & 6, S. Treaty Doc. No. 95-2, 1976 WL 41139 (TIA), 999 U.N.T.S. 171, 174-75, C.T.I.A. Num. 8811.000 (set out in full in Appendix, hereinafter A 1-21).

Article 4 of the ICCPR provides, in part:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

Article 6 of the ICCPR provides, in part:

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

This case involves the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49, 28 ILM 1448 (1989).[1] Article 37 of the Convention provides, in part:

> State Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; . . .

This case also involves Chapter II, Article 4, Section 5 of the American Convention on Human Rights, OAS Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, rev. 1, Corr. 2 (1970)[2] which provides:

> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . . .

Summary of Grounds For Relief

The execution of Petitioner, who was seventeen years old at the time of his crimes, would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The standards of decency have continued to evolve since 1989 when *Stanford v. Kentucky* was decided to the point where execution of persons who were under eighteen at the time of their crimes is barred by the federal constitution.

There is a bright line distinction between minors and adults in laws throughout our nation. For example, those under eighteen are universally denied the right to vote or serve on juries. Sixteen states bar the execution of juvenile offenders by law as do the United States and the District of Columbia. Two states, Montana and Indiana, have enacted their prohibition laws since 1989 (1999 and 2002, respectively). If states without the death penalty are included, twenty-eight states bar the execution of juvenile offenders, and this year seven states have been considering bills raising the eligibility age for

[1]In February, 1995, the United States signed the Convention on the Rights of the Child without formulating any reservations, but the United States is one of only two countries (the other is Somalia) that has not ratified this treaty. The Convention on the Rights of the Child is set out in full in the Appendix (A 25 - 41).

[2]The United States signed (with no reservations), but never ratified, the American Convention, which is included in the Appendix (A42 - 68).

the death penalty to eighteen. Moreover, the rejection of the death penalty for juvenile offenders extends to the international community. And, respected professional organizations such as the American Bar Association and the National Council of Juvenile and Family Court Judges also reject the juvenile death penalty. Additionally, juries rarely impose the death penalty on juvenile offenders. Over the last decade, only fifteen states have had such offenders on their death rows and, since *Stanford* in 1989, only six states have executed juvenile offenders with only three doing so in the last nine years. Kentucky has not executed a juvenile offender since 1945.

Very significant is the absence of any deterrence or retribution rationale to support execution of juvenile offenders. Ongoing research concerning adolescent development, particularly brain development, unequivocally establishes that juveniles cannot be deterred by the existence of the death penalty because they lack appreciation for long term consequences of their acts. Very recent scientific research reveals the adolescent brain is not fully developed and is undergoing major reorganization during adolescence in the area associated with social behavior and impulse control. Juveniles are less morally culpable for their acts and, thus, the retribution rationale for the death penalty is inapplicable to them.

This Court is reconsidering the issue of the constitutionality of the execution of the mentally retarded in *Atkins v. Virginia*. Information relevant to the evolving standards of decency reveals that the rejection of the death penalty for juvenile offenders is comparable to the rejection of its imposition on the mentally retarded. At a minimum, this Court should wait until *Atkins* is decided to determine whether to consider this issue further.

Because Petitioner has been sentenced to death for a crime committed when he was less than eighteen years of age, his execution would also violate international customary law and the obligations of the United States under the International Covenant on Civil and Political Rights ("ICCPR"), a treaty made by the President and ratified by the Senate. This international and treaty law is federal law and thus the supreme law of the Land under Article VI, section 2 of the Constitution of the United States.

Article 6, Paragraph 5 of the ICCPR provides explicitly "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age ...." Although, in ratifying this treaty, the

Senate passed a resolution containing a "reservation" which purported to nullify this provision. that "reservation" was invalid because the ICCPR expressly prohibited derogation from this prohibition and because the reservation violates the object and purpose of the treaty. Numerous sovereign nations which have subscribed to the ICCPR, and the Committee on Human Rights charged with its interpretation and enforcement, have so declared. In addition, the validity of a reservation partly modifying a treaty made by the President is questionable under this Court's recent cases regarding the separation of powers between the legislative and executive branches. *See e.g., Clinton v. City of New York*, 524 U.S. 417 (1998).

In ratifying the ICCPR, the Senate also enacted a resolution of "understanding" that its protections are not "self executing." This resolution constitutes no bar to Petitioner's claim, for several reasons. By its terms it does not bar this kind of defensive use of a treaty prohibition against state action. If it did, it would contravene the object and purpose of the treaty and this Court's caselaw regarding treaty interpretation, and would cede to the House of Representatives a veto power over treaty obligations denied to it by the Constitution itself. In addition, giving force to such an interpretive declaration by the Senate would invade the prerogatives of the judiciary to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Customary international law binding on the United States prohibits imposition of the sentence of death for crimes committed by juveniles under eighteen years of age. The existence of such an international law norm is incontrovertible. It is expressly embodied in the Convention on the Rights of the Child, a multilateral treaty which the President of the United States has signed without reservation and which every organized nation in the world except the United States has ratified. It is also expressed in other multilateral treaties the United States has ratified, including the ICCPR. The norm has been expressed or agreed to by every competent international body. It is followed by every nation in the world except the United States: every other country in the world adheres to one or more treaties forbidding juvenile executions and only three other countries have executed persons for crimes committed as juveniles since 1997 (the Democratic Republic of Congo, Iran, and Pakistan). The same

norm is followed as a matter of law and practice in a large majority of jurisdictions within the United States which retain capital punishment.

Every sovereign nation and international body competent to address the issues presented in this petition supports Petitioner's claims. This Court is the only body that can finally and authoritatively determine whether those views are correct as a matter of the law of the United States, of which the law of nations has always been an integral part. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796). However, the comity owed to other nations and our treaty partners requires that their views at least be considered; and if those views are correct, relief must be granted to prevent the fundamental and irreversible miscarriage of justice that would occur if Petitioner is executed for a crime for which the Supreme Law of the Land does not permit the penalty of death to be imposed.

Statement of the Case

In 1989, this Court held in Kevin Stanford's case that the Eighth Amendment did not bar the execution of an individual convicted of a capital crime which occurred when he was seventeen (17) years old. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Kevin Stanford was charged with capital murder in 1981 when he was 17 and sentenced to death in 1982. This Court upheld his death sentence seven (7) years later. Kevin's life is now literally on the line. Thirteen years have elapsed since this Court upheld the death penalty for 16 and 17 year olds in his case. The time has come for this Court to revisit the issue of the constitutionality of the juvenile death penalty in light of significant developments which prove that the evolving standards of decency now bar the execution of all juvenile offenders, particularly in light of the imminent decision by this Court in *Atkins v. Virginia*, No. 00-8452, 2002 WL. 341765 (February 20, 2000).

A. Summary of Procedural History

Petitioner was sentenced to death for murder and the maximum prison terms for robbery, sodomy and receiving stolen property on September 28, 1982. The crimes occurred on January 7, 1981

when Petitioner was seventeen (17) years old. The Supreme Court of Kentucky affirmed Petitioner's conviction on direct appeal. *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987). (A 77 – 89). This Court granted certiorari and affirmed Petitioner's death sentence. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

Petitioner then filed a state post-conviction action pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. That motion was denied without an evidentiary hearing, and the trial court's decision was affirmed on appeal by the Supreme Court of Kentucky. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993)(A 90 – 96)[3] . Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky on May 9, 1995. The district court dismissed the petition on December 21, 1999 without conducting an evidentiary hearing but issued a Certificate of Probable Cause. The United States Court of Appeals for the Sixth Circuit affirmed the district court in its opinion issued on September 20, 2001 which became final on November 29, 2001.

B. Summary of Facts[4]

Pretrial Proceedings

Petitioner and David Buchanan were indicted in November, 1981. Petitioner filed a motion requesting the Jefferson Circuit Court to transfer his case back to juvenile court. Petitioner, who is black, presented evidence concerning his amenability to treatment and the racially discriminatory application of Kentucky's transfer statute, KRS 208.170.

As to the Petitioner's amenability to treatment, Dana Mattison and Linda Luking testified. Mr. Mattison was a psychotherapist with a Jefferson County social service agency and met Petitioner in

[3] The opinion was authored by Gerald Kirven, Special Justice assigned to replace Hon. Charles Leibson who had presided over Petitioner's trial when he was seeking election to the Supreme Court of Kentucky. At the time the appeal from the order denying the RCr 11.42 motion was heard, Justice Leibson was a member of the Kentucky Supreme Court but did not sit on the appeal.

[4] Petitioner is including in this Petition only facts relevant to his transfer from juvenile to circuit court and the decision by the jury and judge to impose a death sentence.

July-August, 1980. He believed that Petitioner was amenable to treatment and that he needed a one-on-one type treatment program. Earlier treatment programs were unsuccessful because they employed confrontational group treatment and were dysfunctional because they never addressed Petitioner's particular therapeutic needs as based upon the available psycho-social and psychological information. Moreover, Petitioner was not getting any support from his home environment which was essential for him to succeed in a treatment program. The treatment program which Petitioner needed was not available in Kentucky but existed elsewhere and could be implemented in a presently operating Kentucky facility.

Linda Luking met Petitioner when she was doing a social work field placement at the Juvenile Detention Center in Louisville from January to April, 1981. She continued to act as his counselor on a weekly basis from April to December, 1981. She testified that Petitioner's childhood was lonely because of his mother's lack of attention and he had a history of substance abuse and needed treatment. She considered Petitioner amenable to treatment because of behavioral changes she observed while she was working with him.

Petitioner's motion to transfer the case back to juvenile court was denied.

Guilt-Innocence Phase - Verdict

The jury convicted both David Buchanan, Petitioner's co-defendant who had been ruled ineligible for the death penalty, and Petitioner of intentional murder, first degree robbery and first degree sodomy. Petitioner was also convicted of receiving stolen property. The jury recommended that he serve sentences of 20 years, 20 years and 5 years, respectively, on the latter three charges.

Evidence Introduced at Penalty Phase[5]

The defense presented testimony from nine witnesses. George Boller, Petitioner's stepfather, knew Petitioner from the age of four and lived with his mother for 8 years. Boller was divorced from Petitioner's mother, Barbara Boller, when Petitioner was 13 years old. He resided with Mr. Boller for a short time after the divorce. Mr. Boller described Petitioner as a well-behaved child until he underwent a noticeable change around the age of 12 when he began to use drugs regularly. Petitioner spent much of his life with his aunt, Gertrude Dennison. He was an only child but he got along well with her children. However, his relationship to his mother was very distant. Petitioner was not able to communicate with his mother but would talk to Ms. Dennison about his problems. She learned that Petitioner was using drugs when he was 13 or 14. His drug usage caused him to become more distant from her.

James Berry met Petitioner while he was in his class at the Juvenile Employment Skills Program of the Louisville Urban League. He testified that Petitioner was not very verbal and tended to keep matters to himself. He believed that Petitioner's mother and home environment did not provide him with adequate support but Petitioner was reluctant to talk about his home life. He believed that the Petitioner could be rehabilitated. Lloyd Davis met Petitioner while he was working at a juvenile facility, Rice-Audubon Treatment Center, where Petitioner was a resident. He found Petitioner to be very withdrawn and confused about his sexual identity. According to Mr. Davis, the Rice-Audubon facility offered principally group treatment and individuals who needed more individualized treatment could obtain it in the penal system. Petitioner was distant from his treatment group at Rice-Audubon and he

[5] There was a wealth of mitigating evidence which was not presented at trial because trial counsel did not conduct an adequate investigation, including extensive sexual abuse Petitioner experienced beginning at age five by many perpetrators, his mother's rejection, abuse and persistent neglect of him and his exposure from a very early age to alcohol and drug abuse as well as promiscuity. This evidence was first presented to the federal district court but the federal courts would not consider it because of lack of exhaustion.

did not receive any treatment for the confusion about his sexual identity. Mr. Davis, who spent a year in a Kentucky penal institution, believed the Petitioner would benefit from the adult penal system.

Mr. Mattison, who had previously testified at the hearing on Petitioner's motion to transfer his case back to juvenile court, also testified. He had previously been the director of the Juvenile Employment Skills Project of the Louisville Urban League. He met Petitioner when he became involved with the Project in August, 1980. Petitioner exhibited a lack of social interaction skills and a history of drug abuse and had problems being reintegrated into the community because of the lack of support systems available to him. When Petitioner entered the Employment Skills Project, the program made numerous, unsuccessful attempts to contact his mother. When she was finally contacted, it was noted that her level of supervision of the Petitioner was limited due to her work hours and because of "a very dysfunctional relationship between [them]." Petitioner received no support from his mother and remained in the program until his arrest in January, 1981. Mr. Mattison believed that Petitioner was capable of being rehabilitated and that there were a number of programs available throughout the United States.

Linda Luking testified that Petitioner, as early as the age of six, was having difficulty developing social relationships. He was confused as to who was his mother and who was his aunt. Petitioner did not have sufficient bonding with his mother and was unable to obtain it from any other source. He experienced isolation partly because his mother worked and was not home very often. Although Petitioner had a positive family experience when he resided with his stepfather and his stepfather's family, by the age of 12, he had a serious problem with drug addiction. During the course of her counseling relationship with Petitioner, Ms. Luking began to notice a substantial change in him. At first, he was difficult to work with but he eventually attained honor status in the Juvenile Detention Center and his schoolwork began to improve. He began putting in extra time reading, he began writing for the

monthly newsletter, he began to voluntarily participate in various projects and demonstrated interest in the GED program. Ms. Luking believed that Petitioner demonstrated rehabilitative potential and was in need of further counseling.

The Commonwealth offered no proof during the penalty phase. The jury was instructed on 20 mitigating circumstances and two statutory aggravating circumstances (first degree robbery and first degree sodomy). The jury was instructed that it could consider as a mitigating circumstance, "[t]hat at the time of the offense Kevin Stanford was of a very youthful age in light of the fact that he was only 17 years old." However, the jury imposed the death penalty for the murder conviction.

At sentencing, Petitioner moved the court to impose a sentence less than death. Petitioner's mother, stepsister, stepbrother, another youth and a clergyman made statements requesting the trial court to spare Petitioner's life. The clergyman also presented a petition signed by 400 persons requesting that Petitioner's life be spared. The trial court stated that it did not believe "in this case" that age was mitigating, describing Petitioner as "beyond rehabilitation", and sentenced him to death by electrocution for the murder, and 55 years imprisonment on the robbery, sodomy and receiving stolen property convictions.

Argument

THE IMPOSITION OF THE DEATH PENALTY ON A PERSON WHO WAS 17 YEARS OLD AT THE TIME OF THE CRIME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS ALSO BARRED BY TREATIES AND CUSTOMARY INTERNATIONAL LAW IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE II, SECTION 2, ARTICLE III, SECTION 2 AND ARTICLE VI, SECTION 2 OF THE UNITED STATES CONSTITUTION.

1. Whether the death penalty for juvenile offenders violates the Eighth and Fourteenth Amendments' ban on cruel and unusual punishment because the penalty is inconsistent with evolving standards of decency and serves no legitimate penological objectives is an important federal question that should be considered by this Court.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988)(plurality opinion), this Court emphasized the distinctions between minors and adults which exist in the laws of all states as part of its evolving standards of decency analysis. 487 U.S. at 823-825. In *Stanford v. Kentucky*, this Court rejected as irrelevant various laws setting a minimum age of eighteen for activities such as voting and entering into contracts. 492 U.S. at 374-375. Petitioner asserts that the many "bright line" distinctions drawn by our society between minors and adults must be considered in determining whether death is cruel and unusual punishment for crimes committed by 16 and 17 year olds.

Contemporary society recognizes fundamental differences between juveniles and adults that are manifested in numerous laws which restrict a juvenile's ability to exercise the same rights and privileges enjoyed by adults. These laws reflect a considered judgment that 18 is the dividing line between childhood and adulthood. People over 18 are expected to have the maturity and judgment necessary to assume the responsibilities, rights and privileges of adults and they are treated accordingly. Persons under 18 are not deemed capable of exhibiting those qualities. Society, by its laws, considers them to be children and treats them as such. The age barrier erected by society is absolute and treats juveniles as a class and not as individuals. On one side of the boundary stand adults and on the other side stand children. There is no middle ground. Kevin Stanford's age at the time of his crime prevents him from being an adult or being treated as a adult. Society's regulation over the lives and rights of juveniles is so pervasive that prevailing constitutional standards require that capital punishment be prohibited for a youth who was under the age of 18 years at the time of committing a crime.

The legal system's treatment of juveniles mirrors the special status they have been afforded by society.[6] *See Kent v. United States*, 383 U.S. 541 (1966) and *Application of Gault*, 387 U.S. 1 (1967).

[6] The majority of the states (38 and the District of Columbia) set the age of 18 as the limit on juvenile court jurisdiction. Seven states (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, and Texas) set jurisdiction at the age of 17 and five states (Connecticut, New York, North Carolina, South Carolina and Vermont) set jurisdiction at the age of 16.

Each state has enacted a juvenile justice system which shares the same objectives as society for the treatment of juveniles, i.e., protection, nurturing, guidance, and development. *Kent*, 383 U.S. at 554 n.19. Even if there are instances in which society is justified in transferring juvenile offenders to the adult legal system, the death penalty is such an extreme and thorough repudiation of what is sought to be accomplished by society, the juvenile justice system, and the adult penal system, that its imposition on one who was under 18 at the time of committing a crime violates "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

a. Evolving Standards of Decency

The decision of whether a particular punishment violates the Eighth Amendment is rooted in an analysis which "should be informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). *Enmund v. Florida*, 458 U.S. 782, 788 (1982). An Eighth Amendment analysis requires examination of "relevant legislative enactments", the sentencing decisions of juries, *Thompson*, 487 U.S. at 821, "international opinion", and "the historical development of the punishment at issue". *Enmund*, 458 U.S. at 788. These objective factors are essential in determining evolving and contemporary standards of decency. *Thompson*, 487 U.S. at 823-824.

1. Legislative Enactments

The judicial system and state legislatures have recognized the particular vulnerability of children as well as their inherent inability to function in the same responsible manner as is expected of adults. Legislation restricting children's abilities to exercise the same rights and privileges as adults is intended not only to protect children from themselves but also to protect society from the consequences of their immature judgment and impulsive and irresponsible behavior.

The societal and legal distinctions drawn between adults and juveniles rest on a solid foundation.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982), citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

"Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring).

> [T]he experience of mankind, as well as the long history of our law, recognize[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-591 (1975) (Powell, J. dissenting)(emphasis in original).

"There are three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. at 634. The paternalistic role assumed by the State stems from a recognition that juveniles are not expected to exercise the same control over impulses or the same reasoned and mature judgment as adults. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions..." *Parham v. J.R.*, 443 U.S. 584, 603 (1979).

These principles have been embodied in numerous laws which deny juveniles some of the most fundamental rights and privileges enjoyed by adults. For example, in all 50 states and the District of Columbia, the right to vote is extended only to those citizens who have attained a minimum age of 18. *Thompson v. Oklahoma*, 487 U.S. at 839-840.[7] No state permits anyone below the age of 18 years to serve on a jury. *Id.* Forty-four states, including Kentucky (KRS 2.015), define a "minor" as being a

[7] The number of states will include the District of Columbia unless otherwise noted.

person under the age of 18. Five states set the age of majority as being over the age of 18. Two states (Missouri and New York) do not have a uniform age of majority. -

Kentucky places numerous restrictions on the lives and conduct of persons under the age of 18. For example, they cannot vote (Ky. Constitution § 145), purchase or possess alcoholic beverages (KRS 2.015; KRS 244.085) or sit on a jury (KRS 29A.030). Minors cannot enter into valid contracts (KRS 371.010(2)), donate bodily organs (KRS 311.175), make a will (unless they are parents) (KRS 394.020-030) or marry without either parental or judicial consent (KRS 402.020). These restrictions on juveniles are objective factors which reflect society's considered judgment that a 17 year old boy or girl is still a child, not an adult. Society has drawn a bright line between childhood and adulthood. We live on either side of that line and do not become adults until we cross the threshold of the age barrier which society has erected.

Society's recognition of the fundamental differences between juveniles and adults extends to capital punishment. Sixteen states now bar the execution of juvenile offenders by statute. California (California Penal Code § 190.5); Colorado (Col. Stat. 16-11-103); Connecticut (Conn. Gen. Stat. 53a-46a (h)); Illinois (Ill. Stat. Ch. 720 § 5/9-1 (b)); Indiana (SB 426 signed by Governor March 26, 2002; effective July 1, 2002); Kansas (Kansas Stat. 21-4622); Maryland (Md. Code 1957, art. 27, § 412 (g)); Montana (Mont. Code Ann. § 45-5-102) (law passed in 1999); Nebraska (Neb. Stat. § 28-105.01 (a)); New Jersey (N.J. Stat. §§ 2A:4A-22(a); 2C:11-3(g)); New Mexico (New Mex. Stat. 31-18-14): New York (N.Y. Penal Code § 125.27); Ohio (Oh. Stat. 2929.023; 2929.03); Oregon (Or. Stat. 137.707); Tennessee (Tenn. Stat. 39-13-204); and Washington (by court decision: *State v. Furman*, 858 P.2d 1092 (Wash. 1993)). The federal government also bars the practice, along with the District of Columbia. *See* 18 U.S.C. § 3591 (federal); D.C. Code 22-2104 (life sentence for first degree murder; those under 18 at time of offense must be eligible for parole). American University, Washington College of Law,

Clearinghouse of Information - Juvenile Death Penalty, **http://www.wcl.american.edu/humright/deathpenalty/juvstat.html** (visited 4/21/02, hereinafter AUWCL website (A 69 - 76).

Five states specifically allow execution of persons who were seventeen at the time of the offense. Texas (Tex. Penal Code 8.07 (c)); Florida (*Brennan v. State*, 754 So. 2d 1 (Fla. 1999)); Georgia (O.C.G.A. 17-9-3); New Hampshire (N.H. Stat. § 630:1) and North Carolina (N.C. Stat. 14-17). In seventeen states, 16-year-old offenders are eligible for the death sentence. (Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia and Wyoming). AUWCL website. ***Twenty-eight states***[8], therefore, currently bar the execution of juvenile offenders, assuming that non-death penalty states may be included in the calculus. Finally, this year, ***at least seven*** state legislatures have been considering bills that would raise the eligibility age for the death penalty to 18 (Florida (CS-S B 1212; HB 1615), Kentucky (HB 447; SB 127), Mississippi (HB 167), Missouri (SB 819; HB 1836), Arizona (SB 1457; HB 2302), Pennsylvania (SB 27), and Indiana which recently passed the bill. In legislative sessions last year (2001) bills were introduced in South Carolina (Bill 236), Arkansas (SB 78), and Texas (HB 2048). A bill will be filed in the Texas Legislature in the 2003 session. There is every indication, therefore, that soon the number of states barring the execution of juvenile offenders may equal or supercede the number of states barring execution for persons with mental retardation.

This rejection of the imposition of the death penalty for juveniles is not confined to the United States but extends to the international community as well. *See Thompson*, 457 U.S. at 830-831 (plurality opinion). The impact of the international community's consensus on the execution of juveniles is striking for two reasons. First, the universal rejection of capital punishment for juveniles transcends the political, geographic, economic, cultural, racial and religious differences that otherwise separate the

[8] Petitioner is including Indiana as a state barring the death penalty for juveniles since SB 426 has been signed by the Governor and is effective July 1, 2002.

nations of the world. Second, it constitutes an objective indicia of society's evolving standards of decency. See argument 3.

The views of the international community and the majority of jurisdictions in this country are also shared by "respected professional organizations." *Thompson*, 457 U.S. at 830 (plurality opinion). The American Law Institute's Model Penal Code contains a prohibition against capital punishment on person under the age of 18 years at the time the offense was committed.[9] The National Council of Juvenile and Family Court Judges on July 14, 1988, passed Resolution No. 2 which opposed "capital punishment of those who committed an offense while under the age of eighteen years." The American Bar Association (ABA) also opposes the imposition of the death penalty on juveniles (*see Thompson*, 457 U.S. at 830 n. 32). The ABA's opposition to any juvenile death penalty is significant since it has not voiced unqualified opposition to the imposition of capital punishment on adults.

Legislative enactments and the views of respected professional organizations thus support the conclusion that the imposition of capital punishment on juveniles contravenes "evolving standards of decency" and cannot be reconciled with the fundamental values by our society.

2. Jury Determinations

Another "societal factor...in determining the acceptability of capital punishment...is the behavior of juries." *Thompson v. Oklahoma*, 457 U.S. at 831; *Enmund v. Florida*, 458 U.S. at 3372. With regard to the imposition of capital punishment, "[t]he jury...is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). Thus, it is "important to look to the sentencing decisions that juries have made in the course of

[9] ALI Model Penal Code, § 210.6, Commentary at 133 (Official Draft and Comments, 1980); *Thompson v. Oklahoma*, 487 U.S. at 830 n.33 (plurality opinion).

assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker v. Georgia*, 433 U.S. at 596 (plurality opinion).

While juries infrequently impose the death penalty on adults, available data reflects that juries are even more reluctant to sentence a juvenile to death. Indeed, the infrequency with which the death penalty is imposed on juveniles creates not only a presumption of arbitrariness of any juvenile's death sentence but also demonstrates that contemporary society rejects the notion of the death penalty as an appropriate punishment for a juvenile.[10]

Over the last decade, only fifteen states actually have had "juvenile offenders" on their death rows. Amnesty International, *On the Wrong Side of History: Children and the Death Penalty in the USA*, AMR 51/058/1998, October 1, 1998 (Alabama, Arizona, Arkansas, Florida, Georgia, Kentucky, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia); *see also* AUWCL website, *supra* (A 69 - 76) (visited 4/21/02). Since *Stanford* in 1989, only **six states** [Texas (most recently, 2001), Louisiana (1990), Missouri (1993), Georgia (1993), Virginia (1998 and 2000), and Oklahoma (1999)] have executed juvenile offenders. See AUWCL website, *supra*. **Only three have done so in the last nine years.**

There are presently 3,711 persons under a sentence of death in the United States. Of that number, 83 (all males) are juveniles.[11] Thus, juveniles comprise approximately 2.24% of the total death row population. This data reflects a difference in the way juries recommend the imposition of capital punishment on juveniles and adults and supports the conclusion that contemporary sentencing juries

[10] Notwithstanding the value of considering jury verdicts as a measurement of contemporary society's attitudes, it must be remembered that death penalty juries do not encompass a certain segment of the population that opposes capital punishment. Death penalty juries exclude those citizens whose opposition to capital punishment renders them unqualified for jury service under the standards enunciated in *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Lockhart v. McCree*, 476 U.S. 162 (1986).

[11] Death Row, U.S.A. (winter 2002); **http://deathpenaltyinfo.org/DEATHROWUSArecent.pdf** (visited April 2002).

reject the death penalty as an appropriate sentence for a youth who was under 18 at the time of the offense.

Kentucky has not executed a person who was under the age of 18 at the time the offense was committed since 1945. There have been seven juvenile executions in Kentucky in this century: four were for rape – two were for murder – and one involved multiple murders and rape. Streib, *Death Penalty for Juveniles*, (Bloomington IN; Indiana University Press) (1987) at 196. Since *Furman v. Georgia*, 408 U.S. 238 (1972), only three Kentucky juveniles, Petitioner, Todd Ice and Larry Osborne, have been sentenced to death. Ice's sentence and conviction were reversed. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984). On retrial, Ice was convicted of first degree manslaughter and sentenced to 20 years imprisonment. Osborne's sentence and conviction were also reversed. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky. 2001). He is awaiting retrial. Kentucky's experience demonstrates that contemporary society rejects the death penalty as an appropriate sentence for juveniles.

The history of our country's treatment of juveniles, society's recognition of the substantial differences between juveniles and adults, and examination of the objective criteria for determining evolving standards of decency, support the conclusion that imposition of capital punishment on a person who was under 18 at the time of the crime violates the Eighth and Fourteenth Amendments.

b. Legitimate Objectives Of Punishment Are Not Served By The Execution Of Persons Who Were Under The Age Of 18 At The Time Of The Crime.

1. Deterrence

That contemporary juries seldom impose the death penalty on juveniles is a "fact which further attenuates its possible utility as an effective deterrence." *Enmund*, 458 U.S. at 800. There is no deterrence from the fact that capital punishment for juveniles is authorized by some states, because there is only a remote possibility that it will become a reality. Indeed, the plurality in *Thompson* noted the lack of deterrent value that the death penalty has on juveniles. 487 U.S. at 837-838.

The deterrence rationale for a juvenile death penalty is non-existent because juveniles, as a class, display an absence of fear and appreciation of the long-term consequence of their actions. Those latter characteristics are hardly surprising in light of the "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Thompson*, 487 U.S. at 834. Indeed, those characteristics are by-products of the emotional and psychological immaturity so common among adolescents. Normal adolescence is a time of life marked by an absence of fear which is fueled by the adolescent's own sense of invulnerability. Caught between adulthood and childhood, they inevitably wrestle with their own identities and engage in conduct that is marked by a lack of judgment and psychological and emotional immaturity. Adolescents frequently try to prove their adulthood by exhibiting childlike behavior, sometimes with fatal consequences. "The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison." *Id.* at 835 n.43, citing Kastenbaum, *Time and Death in Adolescence*, in *The Meaning of Death*, 99, 104 (H. Feifel ed. 1959). "'Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages...'" *Thompson*, 487 U.S. at 835 n.43, citing Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death*, 16, 27 (C. Coor and J. McNeil eds. 1986). The fear of death thus has little, if any, deterrent value to adolescents not only in terms of the criminal justice system but also as a matter of everyday life.

Society does not expect juveniles to exercise the same rational and reasoned judgment expected of adults. By its laws, society has codified and underscored the cognitive, psychological, emotional, and developmental differences between adults and juveniles. This recognition of the causes and effects of adolescent behavior, as well as the infrequency with which juveniles are sentenced to death and executed, renders the deterrence rational for capital punishment inapplicable to juveniles who are under 18 at the crime was committed.

2. Retribution

Retribution "as an expression of society's moral outrage at particularly offensive conduct" is not a "forbidden objective" of our society. *Gregg v. Georgia*, 428 U.S. at 183. However, the degree of retribution is to be commensurate with the individual's own culpability. *Enmund v. Florida*, 458 U.S. at 798-800. "Adolescence is well recognized to be a time of physiological and psychological change and stress. Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." Lewis et al., *Neuropsychiatric, Psycho-educational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145, Am. J. Psychiatry, 584-588 (May, 1988). *See also* Streib, *Death Penalty for Juveniles*, *supra* at 184-185. These characteristics of "normal" adolescents are surely exacerbated in juveniles who have, like the Petitioner, experienced severe emotional deprivation and neglect from a parent throughout their lives. Society's strict regulation of the lives of juveniles is a recognition that they are subjected to the psychological and emotional characteristics of adolescence for a number of years and can be expected to act accordingly. The imposition of the death penalty, society's most extreme sanction, is therefore inconsistent with the recognized effects and consequences of adolescent behavior.

This Court has emphasized the importance of youth as a reason to spare a juvenile's life because juveniles are less mature and thus less responsible for their acts than adults. *Eddings*, 455 U.S. at 115-116. Juveniles are more vulnerable to influence, peer pressure and psychological damage. They are more impulsive. Our socio-economic and educational system as well as home and family environment share the responsibility for the behavior of juveniles. *Eddings*, 455 U.S. at 115 n.11, citing Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, 7 (1978). Thus, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult". *Thompson*, 487 U.S. at 835 (footnote omitted).

Juveniles are less responsible for their acts than adults because they "are less mature in their ability to make sound judgments" and "less mature in terms of their moral development..." and "are less able to control their conduct and to recognize the consequences of their acts than are adults." Note, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim.L. and Criminology 1471, 1493 (1983). Society bears a greater responsibility for the crimes of minors than for those of adults. The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and guidance and in which there are conflicts, disharmony and poor parent-child relationships. *Id.* at 1495 (footnote omitted). An adult is better situated to eliminate or diminish the factors that contribute to criminal behavior than a juvenile who is less capable of extricating himself from his immediate environment because he is dependent upon his family and the social system for his everyday existence. If either or both of these entities contribute to a juvenile's behavior, age makes it impossible for the juvenile to break the cycle. A juvenile's lack of maturity and under-developed ability to reason and respond rationally to stressful situations serve only to exacerbate a difficult living situation and may thus prompt criminal behavior.

Recent scientific research has supported the long-standing body of social science detailing the transitional nature of adolescence and the difference between children and adults.[12] Adolescents actually think differently from adults. D. Keating, *Adolescent Thinking*, in "At the Threshold," 54-89 (S. Feldman et al. Eds., 1990); W. Overton, *Competence and Procedures*, in "Reasoning, Necessity and Logic," 1-32 (W. Overton ed. 1990). In fact, recent neurological studies show that the adolescent brain is not fully developed and, among other things, undergoes major reorganization in the area associated with social behavior and impulse control. *See* National Institute of Mental Health, *Teenage Brain: A*

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[12] Recent findings at a National Academy of Sciences workshop concerning adolescent development concluded that "Adolescence is a time of physical, cognitive, social, and emotional growth and change." Baruch Fischoff, Nancy A.

Work in Progress, 2/6/01, **http://www.nimh.nih.gov/publicat/teenbrain.cfm:** "Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McClean Hospital Study Reveals", **http://www.mclean.harvard.edu/PublicAffairs/ TurbulentTeens.htm**.[13]

In the recently published The Executive Brain: Frontal Lobes and the Civilized Mind (Oxford University Press 2001) Elkhonon Goldberg states that "[t]he age of 18 is also the age when the maturation of the frontal lobes is relatively complete". *Id.* at 144. Goldberg describes the methods for measuring maturation of various brain structures, naming the frontal lobes as "the CEO of the brain". *Id.* He concludes those lobes "cannot fully assume their leadership role" until they are mature. *Id.* Goldberg also makes this significant observation:

> The agreement between the age of relatively complete maturation of the frontal lobes and the age of social maturity is probably more than coincidental. Without the explicit benefit of neuroscience, but through cumulative everyday common sense, society recognizes that an individual assumes adequate control over his or her impulses, drives, and desires only by a certain age. Until that age, an individual cannot be held fully responsible for his actions in either a legal or a moral sense. This ability appears to depend critically on maturity and functional integrity of the frontal lobes.

Id. at 144-145.

The effects of an adolescent's still-developing cognitive ability include increased impulsiveness, experimentation, and risk-taking. The lack of higher cognitive processing abilities that regulate impulse control and decision-making goes to *mens rea* and the degree of culpability that may exist. For example, studies show that adolescents tend not to plan and therefore often get caught up in unanticipated events and react in the moment, viewing as "accidental" what most adults would have foreseen as likely consequences. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A*

Crowell, and Michele Kipke, Eds., *Adolescent Decision Making, Implications for Prevention Programs, Summary*, National Academy Press, Washington D.C., 1999, **http://stills.nap.edu/readingroom/books/adolescent**.

[13] Numerous news articles describe how recent neurological studies using MRI to compare brains of adolescents to adults suggest a connection between teen behavior and brain development. *See e.g.*, Matt Crenson, "Brain Changes Shed Light on Teen Behavior", *The Times-Picayune*, December 31, 2000, p. A-18; Sharon Begley, "Getting Inside the Teenage Brain"; *Newsweek*, Feb. 28, 2000; Daniel R. Weinberger, "Teen Brain Lacks Impulse Control", *Seattle Post-Intelligencery*, March

Study of 17 Cases, Criminal Justice (Summer 2000), p. 27. Moreover, under stress, even the more cognitively developed adolescents typically cannot effectively use their most advanced judgment and decision-making skills. *Id.* For these reasons, adolescents also tend not to fully appreciate the possibility, and finality, of death; the high rate of teenage suicide is just one distressing consequence of this phenomenon.

Adolescence is also a time during which young people struggle to develop their own identity and their position in the social framework. Identifying with peers is an important part of this self-defining development task. *See* J. Belsky, et al., *Child Experience, Interpersonal Development and Reproductive Strategy*, 62 Child Dev. 647-70 (1991); B. Brown, et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 Developmental Psychol. 521-30 (1986). However, this also leaves adolescents more vulnerable to outside influences and less capable of independent, self-directed action than adults.

"Incorrigibility is inconsistent with youth". *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968). In *Workman*, the imposition of a sentence of life without parole on a 14 year old boy who was convicted of rape constituted cruel and unusual punishment. The same conclusion was reached with regard to a 16 year old boy. *Anderson v. Commonwealth*, 465 S.W.2d 70 (Ky. 1971). The ruling was not extended to adults because "juveniles have historically been labeled as a separate class." *Fryrear v. Commonwealth*, 507 S.W.2d 144, 146 (Ky. 1974). "[I]t is impossible to make a judgment that a [juvenile], no matter how bad, will remain incorrigible for the rest of his life". *Workman*, 429 S.W.2d at 378. "It seems inconsistent that one would be denied the fruits of the law, yet subjected to all its thorns." *Id.* at 377.

13, 2001, ed.; Paul Thompson,"A Child is Not a Man", *Newsday*, May 23, 2001, p. A-33; Shankar Vedantam, "Are Teens Just Wired That Way?" *The Washington Post*, June 3, 2001, sec. A.

Juveniles are not only less morally culpable than adults but also are susceptible to the influence of peer groups and pressures. *Thompson*, 487 U.S. at 835. Thus, the death penalty for juveniles does not advance the objectives of deterrence and retribution and does not make any "measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 433 U.S. at 798.

The deterrence and retribution justifications for the death penalty are especially inapplicable in Petitioner's case. Petitioner's immaturity was specifically recognized by the juvenile court which also acknowledged his "chaotic family life" (A 98), to which the State routinely returned him following each placement in a juvenile facility. The juvenile court noted that the county and the state failed "to provide meaningful therapy for the [Petitioner] or after-care intervention." (A 99). In each juvenile facility placement, Petitioner met "the minimal criteria for release". (A 99). He was then "cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated." (A 99).

Petitioner lacked what every child needs, loving and supportive parents who provide guidance and stability. His mother's neglect and rejection obviously left Petitioner with an emotional and psychological void. He was caught in a vicious circle from which he could not escape. He would be placed in a juvenile facility that would fail to provide him with any meaningful treatment and upon his release, he returned to a "chaotic family life" (A 98 - 99). As an adolescent, Petitioner was not emotionally or psychologically equipped to handle the internal stress necessarily engendered by the dysfunctional relationship with his mother. Petitioner's development is a manifestation of his adolescence. Even at the age of 17, he shared traits common to all other adolescents and responded to his problems and environment in an adolescent fashion. While adolescence may be a transitional period, it is not adulthood.

c. Conclusion

Society has drawn a bright, dividing line between juveniles and adults. Thus, the imposition of capital punishment on an offender who was under 18 at the time the crime was committed is excessive and disproportionate constituting cruel and unusual punishment in violation of the Eighth Amendment. This petition for writ of habeas corpus should be granted.

2. Whether the Eighth and Fourteenth Amendments prohibit application of the death penalty to juvenile offenders is a question comparable to the question being considered by this Court in *Atkins v. Virginia* – whether application of the death penalty to mentally retarded persons is prohibited by the Eighth and Fourteenth Amendments – and this Court should at a minimum hold this petition in abeyance pending the decision in *Atkins*.

This Court's grant of certiorari in Atkins *v. Virginia*, No. 00-8452, is another reason for this Court to grant this petition for writ of habeas corpus or, at a minimum, hold it in abeyance pending the decision in *Atkins*. Counsel have reviewed the transcript of the oral argument which took place on February 20, 2002, and the Court appeared to be interested in information which would affect a decision on the constitutionality of the juvenile death penalty as well as a decision on the constitutionality of the death penalty for mentally retarded persons.

1) The number of states that actually have executed persons with mental retardation since 1989 is about *two*. *Atkins* Oral Argument at *40. As Petitioner noted in this Petition, only *three* states actually have executed juvenile offenders (persons under 18 at the time of the offense) in the last nine years: Texas, Oklahoma, and Virginia, with Texas so far in the lead among states and nations in the practice that it stands out as an exception in the world.

2) The percentage of the total population represented by the states not conducting executions of persons with mental retardation may represent a *consensus*. *Atkins* Oral Argument at *41 (a Justice noting that the two states that had executed persons with mental retardation represented 7 percent of the population). The percentage of total population represented by states executing juvenile offenders over the last nine years is 11 percent. *U.S. Bureau of the Census*, 2000 Census (Total population of the United States, 281,421,906; Texas, 20,851,820; Oklahoma, 3,450,654; Virginia, 7,078,515). Thus, roughly 93 percent of Americans are disassociated from states executing persons with mental retardation, and roughly 89 percent are similarly separated from states executing juvenile offenders over nearly a decade.

3) The reasons underlying the exemption of persons with mental retardation from the death penalty support the finding that there is a correspondingly high risk that juries may inappropriately assess the death penalty in such cases. *Atkins* Oral Argument at *18-*20, *30-*35. Counsel for Atkins asserted that the statutes barring the death penalty for persons with mental retardation reflect the view of the people that, although persons with mental retardation can be punished, they cannot be punished with the death penalty (just as juvenile offenders cannot be punished with the death penalty) because the death penalty is different, raising special concerns. *Id.* at *18-*19. Due to its severity, the death penalty is reserved for the worst offenders, a set which cannot include those who, although they may understand an act is wrong, cannot comprehend "how wrong it is." *Id.* at *20. It does not apply to those whose "understanding of the wrongness of their action may be incomplete and in a sense immature." *Id.* Justice Souter suggested that a constitutional exemption would protect such persons as a class from inappropriately severe punishment, because otherwise there would be an unacceptable risk that jurors would consider them among the "worst of the worst" without recognizing their lesser ability to control their behavior, understand the context of their behavior, and reach moral judgments with complete maturity and responsibility. *Id.* at *31-*36 (Justice Souter's comments), *53-54 (description of class by Atkins' counsel).

The same kind of characteristics are found in persons under 18 years old. The same risk that jurors will not apprehend the difference between juveniles as a class and the "worst of the worst" also is present.

The following additional factors, *inter alia*, support the legal conclusion that, if *Atkins* is decided in favor of the Petitioner, this Court will have foreshadowed a holding that the Eighth Amendment also bars the execution of persons under 18 at the time of their offense:

- Roughly the same number of states currently may be deemed opposed to the execution of juvenile offenders. (30 mental retardation; 28 juvenile offenders).

- Roughly the same number of states currently have explicit bars on the execution of juvenile offenders. (18 mental retardation; 16 juvenile offenders).

- The established moral consensus against the death penalty for juvenile offenders can be seen in the push to raise the death penalty eligibility age to 18 in **seven death penalty states** during this legislative term, with similar pushes in other states (including Texas) expected next year. In the near future, the number of state jurisdictions barring the execution of juvenile offenders could match the number barring the execution of persons with mental retardation.

- Roughly the same number of states have actually executed juvenile offenders over the last nine years. (2 mental retardation; 3 juvenile offenders).

- Roughly the same percentage of the overall population resides in states that have not executed juvenile offenders over the last nine years. (93 percent, mental retardation; 89 percent, juvenile offenders).[14]

- The reasons for exempting juvenile offenders as a class are almost identical. In the last couple of years, a scientific basis for excluding juveniles has been discerned: that their brains simply have not finished developing in ways that directly affect their criminal culpability.

Based on the *Atkins* grant of certiorari, Petitioner requests this Court to grant the petition for writ of habeas corpus or, alternatively, to hold the petition in abeyance pending the decision in *Atkins*.

3. Whether treaties binding on the United States and customary international law prohibit application of the death penalty to juvenile offenders is an important federal question that should be considered by this Court.

This Court last visited the question of the constitutionality of the juvenile death penalty in 1988 and 1989 in two plurality opinions with Justice O'Connor supplying a pivotal concurrence. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989). This Court held in *Stanford* that the execution of persons who were 16 or 17 at the time of the offense did not constitute cruel and unusual punishment while holding in *Thompson* that the execution of those 15 or under at the time of the offense was barred by the Eighth and Fourteenth Amendments. In *Thompson*, this Court embraced the views of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as indicators of the evolving standards of decency, noting especially that juvenile executions were prohibited in the Soviet Union. 487 U.S. at 830. In *Stanford*, this Court rejected the sentencing practices of other countries as irrelevant to interpretation of our "cruel and unusual punishment" clause. 492 U.S. at 370 n.1.; *id.* at 382 (O'Connor, J., concurring in Part II of plurality opinion).

[14] The figure for mental retardation may be high, because the *Atkins* argument suggests that it excludes Texas, which has executed several persons who were arguably mentally retarded, including Mario Marquez and Terry Washington.

This Court should revisit this issue in light of dramatic international changes in the practice of the juvenile death penalty that have occurred since 1989. When considering the Eighth Amendment and Covenant claims below, this Court should take into consideration the fact that a few states within the United States are poised to become the only remaining organized political entities in the world that continue to execute juvenile offenders under some claim of legal right.

Federal constitutional, treaty, and statutory law is superior to all conflicting Kentucky judgments, orders, or statutes. Petitioner was indicted under Kentucky Revised Statute (KRS) 208.170 permitting his transfer to adult court for a felony offense and setting no minimum age of eligibility for the death penalty. He asserts that, through the Supremacy Clause, the Eighth Amendment and Article 6(5) of the International Covenant on Civil and Political Rights individually void the death sentence imposed subsequent to his transfer to adult court. *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (Chase, J., opinion); *id.* (Iredell, J., opinion).

In a well-known footnote, Justice Scalia wrote for the *Stanford* lead plurality, "we emphasize that it is *American* conceptions of decency that are dispositve, rejecting the contention of Petitioners and their various *amici* ... that the sentencing practices of other countries are relevant" to Eighth Amendment analysis. 492 U.S. at 369 n.1 (1989). Those sentencing practices become relevant, however, when they are considered as producing or reflecting the "law of nations" (customary international law). Customary international law is defined as "result[ing] from a general and consistent practice of states which is followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (2) (1987). Considered in isolation, the sentencing practices of other countries clearly are not our practices nor our law, but our Constitution makes the "law of nations" a part of our law. Where the "consistent practice" of other nations results from and is accompanied by a "sense of legal obligation," as indicated for

example by adherence to treaties encoding the practice, it becomes not merely practice but law that the framers intended to bind our courts and undergird our interpretation of our constitution.

The *Stanford* footnote cannot be interpreted as completely rejecting international standards as a component of Eighth Amendment jurisprudence. If it did, it would erroneously reject the original intent of the founders who considered our nation bound to the "law of nations". This intent is reflected in Article I, Section 8, Clause 10, of the Constitution which gives Congress the power to define and punish offenses against the Law of Nations. It is found again in the Supremacy Clause, Article VI, Clause 2, which deems international treaties to be part of the "Supreme Law of the Land." This Court's early cases confirmed a purpose to incorporate international laws and standards into our own jurisprudence. Chief Justice Jay asserted, for example, in *Chisholm v. Georgia*, 2 Dall. 419, 474 (1793), that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed." This Court held in 1804 that Congress should never act in a way that violates the law of nations, if an alternative exists. *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).[15] Our own "evolving standards of decency" likewise should not be construed as at odds with the "law of nations" if they may be viewed as commensurate. Blackmum, H. *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 47-48 (1994) ("There can be no question that the law of nations prohibits the execution of juvenile offenders").

Out of deference to the "international standard," when adopting the International Covenant, the Senate Foreign Affairs Committee asserted that, despite the reservation to Article 6, the States should consider raising the eligibility age for the death penalty to 18:

[15] In the 1880s, this Court also articulated the now well-established rule that treaties have the same status as federal law and that, if they conflict, the one enacted more recently controls. *Head Money Cases*, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 600, 602-03 (1889).

> The Committee recognizes the importance of adhering to internationally recognized standards of human rights. Although the U.S. record of adherence has been good, there are some areas in which U.S. law differs from the international standard. For example, the Covenant prohibits the imposition for the death penalty for crimes committed by persons below the age of eighteen but U.S. law allows it for juveniles between the ages of 16 and 18. In areas such as these, ***it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level.*** However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.

SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 650 (May 1992). Congress promptly set the federal death penalty eligibility age at 18. 18 U.S.C. § 3591 (b) (enacted Sept. 13, 1994); 21 U.S.C. § 848(1) (enacted Sept. 13, 1994).

Kentucky's and other states' failure to follow the Senate Committee's advice has led to the result that a few states within the United States, Iran and Pakistan have become the only ongoing documented executioners of juvenile offenders in the world. When tied to universal adherence to the United Nations Convention of the Rights of the Child, this fact should lead to the inexorable conclusion that a peremptory norm of international law has emerged barring the death penalty for persons under 18 at the time of the offense. "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". VIENNA CONVENTION ON THE LAW OF TREATIES, art. 53, 1155 U.N.T.S. 331, 352 ("Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens)"). The norm is established over dissent from "a very small number" of states. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102, and reporter's note 6 (1986).

All nations (except the United States and Somalia, which has not had a central national government since 1991)[16] have adhered to the Convention on the Rights of the Child without reservation to Article 37(a), which prohibits the death penalty for "offenses committed by person below 18 years of age". REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, MISSION TO THE UNITED STATES OF AMERICA, Jan. 22, 1998, E/CN.4/1998/68/add.3, para. 25; CONVENTION ON THE RIGHTS OF THE CHILD, U.N. Doc. A/4354 (1959), at art. 37(a). Since 1990, out of the 193 nations in the world, only seven have executed juvenile offenders: the United States (14), the Democratic Republic of the Congo (1 in 2000; military), Iran (4: 1 in 1990; 2 in 1992, 1 in 1999; possible execution in 2001), Nigeria (1 in 1997), Pakistan (1 in 1992; 1 in 1997; possible execution in 2001), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). AMNESTY INTERNATIONAL, CHILDREN AND THE DEATH PENALTY, ACT 50/010/2000, December 14, 2000; HUMAN RIGHTS WATCH, WORLD REPORT 2001 ("Children in Conflict with the Law"; **www.hrw.org/wr2k1/children/child4.html**). **Seven** were carried out by Texas. CHILDREN AND THE DEATH PENALTY, *supra*. Except for Iran, apparently, these offenders of the international norm have all instituted reforms:

> In July 2000, Pakistan abolished the death penalty for persons under 18 at the time of offense. *Id.*; WORLD REPORT 2001, *supra*.
>
> In its initial report to the Committee on the Rights of the Child, Saudi Arabia stated that "capital punishment cannot be imposed on children who have not attained the age of majority in accordance with Islamic law." CHILDREN AND THE DEATH PENALTY, *supra*. Saudi Arabia subsequently has asserted that it has no juvenile death penalty. Summary record of the Human Rts. Comm., 56th Ses., paras. 88, 90, UN Doc. E/CN.4/2000SR.53 (June 29, 2000).
>
> Nigeria has reported that national legislation now prohibits the death penalty for offenses committed by persons under age 18. Summary Record of the 6th Mtg. Of the Sub-comm.

[16] Statement by Mona Rishmawi, Independent Expert appointed by the Secretary General on the Situation of Human Rights in Somalia, April 22, 1999, U.N. Commission on Human Rights, Fifty-Fifth Session, OHCHR/99/04/22, E/CN.4/1999/103, E/CN.4/1999/103.add.1.

on the Promotion and Protection of Human Rights, 56th Sess., paras. 39-40, UN Doc. E/CN.4/Sub.2/2000/SR.6 (Sept. 5, 2000).

The 2000 Congo military execution took place under circumstances without appeal and with immediate execution. WORLD REPORT 2001, *supra*. The Congo President had pardoned a 13-year old child soldier in 1998. *Id.* Human Rights Watch recently intervened to stop the execution of 4 other death sentenced child soldiers in the Congo. **http://www.hrw.org/press/2001/05/congo-ltr-0502.htm**.

Iran has adopted the Convention on the Rights of the Child. Iran also represented to the United Nations Commission on Human Rights on April 11, 2001, that it no longer executed juvenile offenders. United Nations Commission on Human Rights, 57th Session, 11 April 2001, Evening and Night. However, the Iran News Agency recently reported that on May 29, 2001, an 18-year old was hung for a crime he committed when 16. "Iran Hangs 18-year old for 1999 Killing", *Washington Times*, May 30, 2001.

The world-wide trends culminating in steady progress toward a peremptory norm (*jus cogens*), without a true competing norm, point to the need that *Stanford* be revisited. By steadfastly insulating ourselves from the universal norm, we have dismayed our allies and invited the calumny of prolific human rights abusers. Embassy of the People's Republic of China, Human Rights Records in the United States, March 1, 1999, **www.china-embassy.org/eng/7073.html** ("The United States is one of only six remaining countries in the world that imposes the death penalty on juveniles, with 25 states violating the International Human Rights Conventional and maintaining the death penalty for minors.").

Our Eighth Amendment jurisprudence must be interpreted consistently with our treaty obligations. *See e.g., Stanford*, 492 U.S. at 390 (Brennan, J., dissenting) (considering "three leading human rights treaties ratified or signed by the United States explicitly prohibit[ing] juvenile death penalties"); Blackmum, H., *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39, 48-49 (1994) ("Under the principles set forth in the Paquete Habana, interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind."). We must take into account the binding effect of our country's **signatures** to the Convention on the Rights of the Child and the American Convention on Human Rights without

reservation to their bar on the death penalty for juvenile offenders. *Stanford* also should be revisited if this Court agrees that the United States' reservation to Article 6(5) of the International Covenant, *infra*, is invalid and void, but also determines that the Senate's declaration on non-self-execution prevents individuals from accessing the courts to lay claim to their Covenant rights.

4. Whether the United States' reservation to Article 6, Paragraph 5, of the International Covenant on Civil and Political Rights is valid and whether Stanford has a private right of action are important federal questions that have not been, but should be, settled by this Court.

a. The reservation to Article 6, Paragraph 5 is invalid and void. This Court has seen this issue in *Domingues v. Nevada*, 528 U.S. 963 (1999)(Mem.), and received a brief on it from the Solicitor General. *Domingues v. Nevada*, 526 U.S. 1156 (1999)(Mem.); *See Domingues v. State*, 961 P.2d 1279 (Nev. 1998). The Solicitor General's misinterpretation of international treaty law as it has evolved in regard to reservations in multilateral human rights treaties may have been a cause for this Court's denial of review in *Domingues*. This point will be developed *infra*.

Article 6(5) of the ICCPR prohibits the death sentence for "crimes committed by persons below eighteen years of age." ICCPR, at art. 6, para. 5. Upon ratification of the treaty in 1992, the United States attached a reservation to Article 6, reserving "the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by person below 18 years of age." SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS, 31 I.L.M. 645, 653-54 (1992) [hereinafter 31 I.L.M. 645].

The HRC issued a General Comment in April 1994 that set the requirements for reservations to the ICCPR:

1. "[W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty."

2. "Reservations that offend ***peremptory norms*** would not be compatible with the object and purpose of the Covenant...Accordingly, a State may not reserve the right...to execute...children."
3. "While there is not automatic correlation between reservations to ***non-derogable provisions***, and reservations which offend against the object and purpose of the Covenant, a State has a ***heavy onus*** to justify such a reservation."
4. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

GENERAL COMMENT 24,, U.N. GAOR Human Rights Comm., 52d Sess., paras. 5, 6, 8, 10, 18, U.N. Doc. CCPR/C/21/Rev1/Add.6 (Nov. 1994) [GENERAL COMMENT] (emphasis added).

The reservation to Article 6 is invalid because it is incompatible with the object and purpose of the treaty, offends a peremptory norm against the execution of persons under 18 at the time of offense, and attempts to reserve a non-derogable provision. The non-derogation clause of the ICCPR prohibits "derogation from Article []6." ICCPR, art. 4, para. 2. The United States has not come close to meeting the "heavy onus" of justification for its reservation to Article 6.[17]

In its first report on United States compliance, the HRC found the United States' reservation to Article 6(5) of the ICCPR invalid:

> Para. 279. The Committee is...particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, U.N. Doc. A/50/40 (October 3, 1995), para. 279 [hereinafter *Official Records]*. It cannot be doubted that the HRC found the reservation invalid, for the HRC added that it "**deplore[d]** provisions in the legislation of a number of states which allow[ed] the death penalty to be pronounced

[17] The Senate justified the reservation on the grounds that prompt ratification would not be obtained if the non-complying states had to raise their eligibility ages first. 31 I.L.M. 645, 650 (1992). This does not approach a remotely acceptable justification for derogation (e.g., national emergency). In fact, the United States jointly sponsored a General Assembly resolution in 1980 that Article 6 established a "minimum standard" for all member states, whether or not they had adopted the ICCPR. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed". *Id.* at para. 281 (emphasis added).

The HRC's findings and jurisprudence must be placed within the proper legal and factual context:

1. Any finding that the reservation is valid and non-severable is diametrically opposed to the united position of numerous treaty partners.[18]
2. Any finding that the reservation is valid and non-severable is diametrically opposed to the United Nations Special Rapporteur's interpretation.[19]
3. Any finding that the "valid" reservation is binding through the Supremacy Clause as a constituent part of the treaty is contrary to the Senate intent as expressed in the hearing record.[20]
4. Any finding that the "valid" reservation is binding through the Supremacy Clause as a part of the treaty is contrary to the Senate's intent as expressed upon ratification.[21]

Given that treaty law fundamentally rests upon consent, a reservation to a multilateral human rights treaty should be deemed void if: (1) the reserving Party recognizes the competence of the treaty

[18] Eleven have expressly opined that the reservation is invalid (Belgium, Denmark, Germany, Finland, Sweden, Spain, Portugal, Norway, the Netherlands, Italy, and France). *Multilateral Treaties Deposited With the Secretary General, Status as at 31 December 1994*, U.N. Doc. St/LEG/SER.E/13 (1995). Italy, for one, has declared that the "reservation is ***null and void*** since it is incompatible with the object and purpose of art. 6 of the Covenant." *Id.*

[19] In 1998, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions made the same "suggestion" as the HRC, that the United States "lift the reservations, particularly on Article 6." However, he made the "suggestion" based upon his assessment that the reservation was invalid ("incompatible with the object and purpose) and ***"therefore...void."*** SPECIAL RAPPORTEUR, *supra*, at paras. 140, 156(k).

[20] The Chair of the Senate Foreign Relations Committee, Sen. Claiborne Pell, held that the Covenant reservations were "purely domestic statement[s]...not part of the treaty contract and therefore hav[ing] no international effect." INTERNATIONAL HUMAN RIGHTS TREATIES: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, 96th Cong., 1st Sess. 79 (1979); *accord United States v. Duarte-Acero*, 208 F.3d 1282, 1285-86 (11th Cir. 2000) (finding that the Covenant's provisions themselves do not purport to regulate affairs between nations"). Senator Pell concluded that, since the reservations were not integral to the Covenant, they probably would not bind the judiciary. *Id.* (relying, in part, upon *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. 1957)). Certainly, according to Sen. Pell's understanding, an **invalid** reservation would not be binding upon the courts through the Supremacy Clause.

[21] The non-binding character of the reservation to Article 6 finds expression in the Senate Foreign Relations Committee's comments upon adoption of the Covenant recognizing that the necessity to remove the reservation might arise. The Committee "recognize[d] the importance of adhering to internationally recognized standards to human rights," and observed that, because Article 6 represented an "internationally recognized standard of human rights," change in domestic law might be "appropriate and necessary." 31. I.L.M. 645, 650 (1992). The first Bush Administration, in turn, promised our treaty partners that ***"judicial means"*** would be used to guarantee full domestic compliance with the Covenant. *Id.* at 657.

monitor to judge parties' compliance (*see* 31 I.L.M. 645, 649-50, 558-59 (1992); GENERAL COMMENT para. 11; *Duarte-Acero*, 208 F.3d at 1287); (2) the competent authority declares the reservation invalid (*Official Records, supra*, at para. 279); and (3) the Party was aware or merely *should have been* aware that its reservation might be deemed invalid (31 I.L.M. 645, 650 (1992); (the Senate **was** aware). *Loizidou v. Turkey*, (1995) 20 E.H.R.R. 99, at paras. 94-95 (allowing severance of invalid restrictions where "respondent Government ***must have been aware***...that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs"); *Belilos v. Switzerland*, (1988) 10 E.H.R.R. 466, at para. 60 (allowing severance of invalid declaration where it was "beyond doubt that Switzerland [was], and regard[ed] itself as, bound by the Convention irrespective of the validity of the [challenged] declaration [and] the Swiss Government recognized the Court's competence to determine the ...issue"); *Power Authority v. Federal Power Comm'n*, 247 F.2d 538, 541 (D.C. Cir. 1957) (holding that federal court could determine validity of and sever a "reservation" that was "merely an expression of domestic policy which the Senate attached to its consent").

The eleven European nations that objected to the United States' reservation found that, although the United States had violated the non-derogation provision in Article 4, Paragraph 2, and had introduced a reservation contrary to the object and purpose of the treaty, this did not preclude entry into force of the treaty between them and the United States. *Multilateral Treaties Deposited With the Secretary General, Status as at 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 (1995). The European nations' assurance that the treaty remained in force reinforced their position that the United States could not negotiate away the objective right to life that the Covenant guarantees to 16 and 17-year-olds.

b. The non-self-execution declaration is no bar to relief. The first Bush Administration stated that "for reasons of prudence" it would "recommend including a declaration that the substantive provisions of the Covenant are not self-executing." 31 I.L.M. 645, 657 (1992). The Bush Administration explained that it did not modify Article 50 ("The provisions of the Covenant shall extend to all parts of federal States without any limitations or exceptions") so as to signal to treaty partners that the United States would "implement its obligations under the Covenant by appropriate legislative, executive and *judicial* means, federal or state as appropriate, and that the Federal Government w[ould] remove any federal inhibition to the states' abilities to meet their obligations". 31 I.L.M. at 657 (emphasis added). The Administration further explained that the purpose of the declaration was to clarify that Articles 1-27 would not *by themselves* create private rights enforceable in U.S. courts. *Id.; see Maria v. McElroy*, 68 F. Supp. 2d 206, 2354 (E.D. N.Y. 1999) ("The fact that the Covenant creates no private right of action does not eliminate the obligations of the United States and all of its branches of government").[22]

c. Reasonable jurists should rely upon the HRC's interpretation. Reasonable jurists should rely upon the HRC's persuasive authority in determining the validity and severance of reservations, especially where no real controverting authority is presented. *United States v. Duarte-Acero*, 208 F.3d at 1287 (the HRC's guidance is the "most important" component in interpreting an ICCPR claim); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); *Maria*, 68 F. Supp. 2d at

[22] Additionally, Petitioner asserts that the Covenant can be used as a defense, even if it were not self-executing, because a treaty always nullifies inconsistent state law. *Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961) (defense to escheatment of property); *Patsone v. Pennsylvania*, 232 U.S. 138, 145 (1914) (defense permitted, but nothing conflicted with state law); *Cook v. United States*, 288 U.S. 102 (1933) (defense to personal jurisdiction over defendant); *Ford v. United States*, 273 U.S. 593 (1927) (same); *United States v. Rauscher*, 119 U.S. 407 (1886) (government violated treaty by trying defendant on charge differing from that forming basis of extradition grant); *see United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty."). If this Court were to find the reservation valid, but the declaration to bar review, it should still send a message to Kentucky, perhaps through the Eighth Amendment, that its juvenile death penalty violates the ICCPR.

234 ("authoritative" HRC); *United States v. Bakeas*, 987 F. Supp. 44, 46 n. 4 (D. Mass. 1997) (HRC is "ultimate authority" regarding validity of reservations).

Rejection of the persuasive authority of the HRC by this Court would violate Executive intent and abandons the proper task of the federal courts. The Bush Administration recognized the competence of the HRC "not the least because it [was] hoped that the work of the Committee w[ould] contribute to the development of a generally international law of human rights". 31 I.L.M. at 658. The appointed task of the courts is to determine what the law is, especially in the area of "individual rights". *Marbury v. Madison*, 5 U.S. 137, 163, 166 (1803). The determination whether treaties contain articles that may be "void" also is the peculiar province of the judiciary. *Jones v. Talker*, 13 F. Cas. 1059, 1062, 2 Paine 688 (C.C.D. Va., no date reported); *Jones v. Meehan*, 175 U.S. 1, 32 (1899). The HRC's jurisprudence and reports provide authoritative guidance into the validity and severability of conditions attached to the ICCPR. Where there is no contrary authority to the HRC's interpretation (or an interpretation based upon the HRC's jurisprudence), that interpretation should prevail. This petition should be granted based on the arguments advanced by petitioner.

CONCLUSION

For the reasons set forth in this Original Petition, Petitioner requests the Court to grant the petition or, alternatively, to hold the petition in abeyance pending the decision in *Atkins*.

Respectfully Submitted,

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VERIFICATION

COMMONWEALTH OF KENTUCKY)
) ss.
COUNTY OF LYON)

KEVIN STANFORD declares as follows:

I am an inmate in the custody of the Kentucky Department of Corrections at the Kentucky State Penitentiary, Eddyville, Kentucky and have been convicted and sentenced to death in the Jefferson Circuit Court, Louisville, Kentucky. I have been advised of and reviewed the contents and arguments in the foregoing Original Habeas Petition Filed Pursuant to 28 U.S.C. § 2241(a). I have authorized my attorneys, Margaret O'Donnell and Gail Robinson, to file the foregoing Original Habeas Petition Motion Filed Pursuant to 28 U.S.C. § 2241(a) on my behalf. I verify that I have read the foregoing document and the facts contained within it are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Kevin N. Stanford
Kevin Stanford

Subscribed and sworn to before me by Kevin Stanford on this __ day of April, 2002.

Charles D. Roberts
Notary Public, State at Large

Commission expires: 08 MAR 03

CHARLES D. ROBERTS NOTARY PUBLIC STATE AT LARGE, KY.